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IN THE

Supreme Court of the United States

JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND OF JULIE DOE, A MINOR,
Petitioner,

v.

MYSPACE, INC. AND NEWS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Fifth Circuit's interpretation and application of Section 230 of the Communications Decency Act of 1996 is the culmination of a long line of cases on one side of an intercircuit conflict that has recklessly distorted a statute that was intended to foster protection of child Internet users into a catch-all immunity with the precise opposite effect. While the Seventh Circuit has definitively staked out its position that, whatever it does, §230's prohibition on treating interactive service providers as publishers or speakers does not endow those providers with

blanket immunity from all civil liability, other courts, beginning with the Fourth Circuit, have steadily expanded §230's reach beyond any connection with the statutory text. Building on the case law siding with *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (CA4 1997), the Fifth Circuit has now taken the final step away from both the statutory text and the Seventh Circuit's restrictive interpretation of it by effectively holding that §230 immunizes providers from nonvicarious tort liability under, at least, any fact pattern involving third-party communications. Because the Internet is fundamentally a communications medium, that holding removes any meaningful limit on the scope of §230 immunity. In particular, it absolves interactive service providers of any civil liability for negligent—or even willful—failure to protect children from harm by third-party predators, directly contrary to the statutory text and congressional intent.

Respondents' brief in opposition demonstrates precisely why the Court needs to address the interpretation of §230. There is no dispute in any quarter that 47 U.S.C. §230(c)(1), by its plain terms, reaches claims that would "treat[]" an interactive service provider "as the publisher or speaker of any information provided by another information content provider." But respondents, like the Fifth Circuit in its opinion, fail to grapple with the issue of what distinguishes claims that treat a provider as a publisher or speaker and those that do not. Other courts have, at a minimum, applied §230 only in circumstances in which the content of third-party communications was itself relevant to a cause of action. The Seventh Circuit has suggested that §230 may be even more limited than that, and, indeed, that it may be improper to view §230(c)(1) as

conferring immunity at all. The Fifth Circuit's failure to distinguish Doe's claims—alleging that MySpace's liability arises not from the content of the communications between Julie Doe and her attacker but from MySpace's negligent and grossly negligent facilitation and encouragement of any contact between those individuals—from content-based claims has taken §230 farther than any other court has been willing to go.

As the Internet matures and, indeed, becomes a dominant medium for social and commercial interaction in our society, there is little reason to hold Internet-based businesses to a lower standard of care with respect to patrons injured by those businesses' tortious conduct. Nor has Congress mandated such a lower standard. But this Court needs to correct a judicial interpretation of §230 that, in several circuits—especially, now, the Fifth Circuit—has nearly eliminated tort liability for those businesses' by stretching a limited Good Samaritan provision beyond all recognition.

ARGUMENT

The courts that have considered §230 have fallen into two main camps, with several taking an expansive view of the statute and the Seventh Circuit articulating a limited view. The Fifth Circuit placed itself squarely into the expansive-view camp, with a holding that clearly conflicts with the Seventh Circuit's statements that §230 does not grant vast, limitless immunity from civil liability. The Fifth Circuit simultaneously created additional conflict within the group of cases taking an expansive view of §230 by going farther even than any other court on that side of the divide. If the Fifth Circuit's interpretation gains traction, the split will continue

to deepen. And if that view prevails, §230 will be applied in ways directly contrary to Congress's purpose of encouraging service providers to protect children who patronize their sites.

I. THE FIFTH CIRCUIT HAS REMOVED ANY MEANINGFUL LIMIT ON §230, EXPANDING ITS APPLICATION BEYOND THAT RECOGNIZED BY ANY OTHER COURT.

Understanding the effect of the Fifth Circuit's holding in this case requires going beyond what the Fifth Circuit purported to be doing and examining what its application of §230 actually did. Simply put, the Fifth Circuit effectively held that §230 immunizes an interactive service provider from all civil liability whenever a case involves a communication originating from someone other than the service provider.

Doe's claims simply have nothing to do with treating MySpace as the publisher or speaker of communications between Julie Doe and her attacker, Solis. Rather, Doe's claims treat MySpace as the proprietor of a business that negligently created an unreasonable risk of harm and then failed to take reasonable steps to protect Julie from that foreseeable harm. A bar may be held liable for negligently allowing children to enter, and a teen club can be held liable for negligence that leads to foreseeable physical or sexual attacks. In both circumstances, while the claim may be causally related to speech that occurs during the commission of the tort, the negligence claim would not depend on treating either the bar or the teen club as a publisher of that speech. There are, to be sure, state-law limits on recognized tort duties, but those limits are not at issue in this petition, only whether those claims

require treating MySpace as the publisher or speaker of inherently tortious communications. Compare Pet. App. 17a (not reaching the viability of Doe's claims under Texas law) with *Doe* v. *GTE Corp.*, 347 F.3d 655, 660-662 (CA7 2003) (finding plaintiffs stated no viable state cause of action).

Doe makes no claim against MySpace alleging that the online communications from Solis were in and of themselves tortious. In particular, the essence of "publisher" liability is liability premised on the publisher's imputed knowledge of the *content* of the relevant communications. *E.g.*, *Grace* v. *eBay, Inc.*, 16 Cal. Rptr. 3d 192, 199 (Cal. Ct. App. 2004), review granted and opinion superseded, 99 P.3d 2 (Cal. 2004) and review dismissed, cause remanded, 101 P.3d 509 (Cal. 2004). Doe does not seek to hold MySpace liable for content that was defamatory or obscene. It was not the content of communications between Julie and Solis that was tortious but the fact that MySpace facilitated the dangerous situation in which those individuals came into contact at all, without providing adequate safety measures or warnings to Julie or her parents.

Nor do Doe's claims allege liability for "any action voluntarily taken in good faith to *restrict* access to or availability of material" or "any action taken to enable or make available to information content providers or others the technical means to *restrict* access to material." 47 U.S.C. §230(c)(2) (emphasis added). The purpose of §230(c)(2) is to protect service providers from liability to users whose communications have been limited or removed because the providers have taken affirmative steps to prevent improper communications and, perhaps, to confirm that taking such steps does not make a

provider a publisher under defamation law. But Doe's claims allege liability for MySpace's *failure* to provide adequate restrictions preventing Julie's victimization in conjunction with a business model that affirmatively encourages young people to socialize with perfect strangers.

Thus §230(c)(2), which the Fifth Circuit did not reach, cannot support its holding any more than can §230(c)(1). As the Seventh Circuit has asked, "Why should a law designed to eliminate ISPs' liability to the *creators* of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *GTE*, 347 F.3d, at 660. Indeed, given that §§230(c)(1) and 230(c)(2) are together expressly captioned "Protection for 'Good Samaritan' blocking and screening of offensive material," "Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?" *GTE*, 347 F.3d, at 660 (citing *Carlisle* v. *United States*, 517 U.S. 416, 421 (1996)); cf. *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 461 F.Supp.2d 681, 696 (ND Ill. 2006), aff'd, 519 F.3d 666 (CA7 2008) (explaining that §230(c) was enacted "specifically to overrule the court decision in *Stratton Oakmont, Inc.* v. *Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)," which treated an Internet service provider as a publisher for purposes of defamation liability because it undertook to remove offensive postings). MySpace's interpretation of §230(c)(2) to confer blanket immunity for *failure* to adequately protect children on its website, Br. in Opp. 18, turns that Good Samaritan provision—intended to incentivize service providers to protect children—on its head.

Because Doe's claims do not allege liability for the content of communications or actions taken to restrict access to materials, the Fifth Circuit's holding can only be understood to apply §230 simply because the causal chain resulting in Julie's assault included online communications. Because the Internet is, by definition, a communications medium, it is impossible to conceive of any cause of action against an interactive service provider that does not involve communications. The effect of the Fifth Circuit's holding is thus to remove any potential limit on the reach of §230, at least for any claim involving a third party. Under the Fifth Circuit's reasoning, a provider like MySpace cannot be held liable for its own tortious conduct as long as a communication with a third party forms part of the causal chain. In that circuit, then, §230(c)(1) has become an all-encompassing blanket of civil immunity.

Even the cases that have taken an expansive view of §230—by suggesting or holding that it could apply beyond claims sounding in the traditional law of defamation—have not gone so far as to apply it in a case like this one in which the content of the communications themselves is not an element of the tort alleged. MySpace's attempts to avoid the distinction between this case, in which the content of communications between Julie and Solis is not an element of Doe's claims, and the other cases applying §230 expansively fail. In all of those cases, the content of communications was a necessary element of the claims. *Zeran*, 129 F.3d, at 329, 332 (alleged harm caused by postings stating that plaintiff was selling Oklahoma City bombing t-shirts); *Ben Ezra, Weinstein, & Co.* v. *America Online Inc.*, 206 F.3d 980, 983 (CA10 2000) (harm caused by false securities-related information); *Universal Commc'n*

Systems, Inc. v. *Lycos, Inc.*, 478 F.3d 413, 416 (CA1 2007) (same); *Doe* v. *America Online, Inc.*, 783 So.2d 1010, 1011-1012 (Fla. 2001) (harm caused by communications advertising child pornography); *Gentry* v. *eBay, Inc.*, 99 Cal.App.4th 816, 820, 121 Cal.Rptr.2d 703, 706 (2002) (harm caused by false representations in advertisements); *Green* v. *America Online, Inc.*, 318 F.3d 465, 468-469 (CA3 2003) (pro se complaint alleging transmission of "harmful online messages" with content including malicious software and misrepresentations that plaintiff sought homosexual encounters).

II. THE SEVENTH CIRCUIT HAS ARTICULATED A LIMITED VIEW OF §230 THAT DIRECTLY CONFLICTS WITH THE FIFTH CIRCUIT'S LIMITLESS ONE.

The Fifth Circuit's interpretation of §230, which ignores whether the content of communications is an element of a plaintiff's claims, may be viewed as a clear break from *Zeran* and its progeny. Cf. *Zeran*, 129 F.3d, at 330 ("[Section] 230 creates a federal immunity to any cause of action that would make service providers liable for *information* originating with a third-party user of the service." (emphasis added)). Or it might be viewed as simply an unsurprising outgrowth of the *Zeran*-based jurisprudence that began untethering §230's application from its textual mooring. But regardless, the Fifth Circuit's transformation of §230 into a virtually limitless immunity from civil liability directly conflicts with the Seventh Circuit's view that §230 is nothing of the kind.

The Seventh Circuit recognizes that "§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other

online content hosts." *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669-670 (CA7 2008) (quoting *GTE*, 347 F.3d, at 655); see also *Craigslist*, 461 F.Supp.2d, at 696 ("Congress did not intend to grant a vast, limitless immunity."). While *Zeran* would afford immunity for "*any* cause of action that would make service providers liable for information originating with a third-party user of the service," *Zeran*, 129 F.3d, at 330 (emphasis added), the truly limited view of §230 confines its application to those cases in which the plaintiff brings a claim sounding in defamation that seeks to impose traditional "publisher" liability on an interactive service provider. *Craigslist*, 461 F.Supp.2d, at 696-697 (limiting "the immunity afforded under Section 230 to those claims that require 'publishing' as an essential element—as opposed to *any* cause of action" and noting that §230 was enacted to abrogate *Statton Oakmont*, which applied traditional publisher liability to an online service provider).[1]

The Fifth Circuit's application of §230 to claims that are so far beyond traditional publisher liability in the realm of defamation law is not even arguably in harmony with the Seventh Circuit's view of §230. MySpace cannot gloss over that conflict simply by asserting that the Fifth Circuit purported to apply §230 because the claim was "directed at MySpace acting in its '"publishing, editorial, and/or screening

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[1] See also *e.g.*, *Dimeo* v. *Max*, 433 F.Supp.2d 523, 528 (ED Pa. 2006) (indicating that §230(c)(1) grants immunity from claims seeking to impose the "traditional treatment of publishers under statutory and common law").

capacities."'" Br. in Opp. 15 (quoting Pet. App. 11a).[2] Aside from the Fifth Circuit's disregard of whether Doe's claims contained any content-based element, neither that court nor MySpace in its brief in opposition provides any analysis demonstrating that Doe's claims fall within the scope of publisher liability under longstanding defamation law. Cf. *Barrett* v. *Rosenthal*, 40 Cal.4th 33, 47, 146 P.3d 510, 518 (2006) (noting that "publication is an element of defamation"); *id.*, at 66, 146 P.3d., at 520 ("Those terms [publisher and speaker], employed in section 230(c)(1), are drawn from the law of defamation.").

Conclusory assertions that the Fifth Circuit's holding is consistent with the Seventh Circuit's interpretation of §230 do not make it so. The effect of the Fifth Circuit's holding is to eviscerate any meaningful constraint on §230(c)(1), an effect that cannot be harmonized with the Seventh Circuit's recognition that §230(c)(1) might not confer any "immunity" at all, *Craigslist*, 519 F.3d at 669-670; *GTE*, 347 F.3d, at 655, and certainly is not "a general prohibition of civil liability." *Craigslist*, 519 F.3d at 669-670; accord *GTE*, 347 F.3d, at 655. MySpace's suggestion that the Seventh Circuit was merely referring to §§230(e)(1) and (2), Br. in Opp. 15 & n.4, fails. Section 230(e)(1) preserves *criminal* liability, which, by definition, is not civil liability. And, while §230(e)(2) expressly preserves civil liability for intellectual property infringements, §230(e)(3) provides that "[n]othing in this section shall be construed to prevent any State from enforcing *any* State law that is consistent with this section." (emphasis added) That broad language would be

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[2] The portion of the court of appeals's opinion quoted by MySpace was, in fact, quoting the district court's opinion.

superfluous if intellectual-property liability were the only civil liability exempted from an otherwise limitless immunity granted by §230(c). And if Congress intended to preserve state *criminal* liability only, it would have used language mirroring §230(e)(1) (or simply included state criminal statutes in that section). See 47 U.S.C. §230(e)(1) (providing that §230 has no effect on any "Federal criminal statute").

III. THE PRESUMPTION AGAINST PREEMPTION REQUIRES CURTAILING THE FIFTH CIRCUIT'S EXPANSIVE VIEW OF §230 AND EMBRACING THE SEVENTH CIRCUIT'S TEXT-BASED VIEW.

Section 230(e)(3)'s express preservation of "any State law that is consistent with this section" would be meaningless if, as the Fifth Circuit's decision necessarily implies, §230 preempts any state-law cause of action involving a communication originating from a third party. The Fifth Circuit's holding ignores the presumption against finding that Congress has preempted state law and the principle that preemption provisions are thus to be construed narrowly. That holding is thus inconsistent with a long line of cases from this Court and the circuits. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Montalvo* v. *Spirit Airlines*, 508 F.3d 464, 474 (CA9 2007); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1256 (CA11 2003).

In its attempt to defend the Fifth Circuit's expansive interpretation of §230, MySpace simply ignores the presumption against preemption, failing even to address the presumption. But that

presumption is particularly strong when the subject matter—in this case protection of child welfare and matters of health and safety—is within the traditional regulatory authority of the States. See *Bates*, 544 U.S., at 449; see also *Medtronic, Inc.*, 518 U.S., at 485; *Anderson* v. *Sara Lee Corp.*, 508 F.3d 181, 192 (CA4 2007). This case vividly demonstrates the need for the Court to reign in the overly expansive jurisprudence that has culminated in the Fifth Circuit's finding §230 to be a fount of boundless immunity and confirm the correctness of the Seventh Circuit's restrained view, which appropriately respects statutory text, congressional purpose, and state sovereignty.

CONCLUSION

For these reasons, and those discussed more fully in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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